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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1030

CRESCENT EXPRESS LINES, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HUDSON TRANSIT LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF MOUNTAIN TRANSIT CORPORATION OPPOSING JURISDICTION AND MOTION TO AFFIRM.

HENRY P. GOLDSTEIN,
Counsel for Appellee,
Mountain Transit Corporation.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 19-339

CRESCENT EXPRESS LINES, INC.,

Plaintiff,

against

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants,

and

HUDSON TRANSIT LINES, INC., AND MOUNTAIN TRANSIT CORPORATION,

Intervenors.

STATEMENT MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES AND MOTION TO AFFIRM DECREE AND JUDGMENT OF STATUTORY COURT.

Facts.

This is a suit filed by plaintiff to set aside orders of the Interstate Commerce Commission so as to reinstate a prior order. The orders sought to be set aside are: (1) an order dated September 2, 1941 (Exhibit A annexed), awarding to the applicant a certificate of convenience and necessity as

described therein and setting aside a previous order dated June 20, 1938 (Exhibit D annexed), covering the same facts; (2) an order dated March 17, 1942 (Exhibit B annexed), denying a petition objecting to the order of September 2, 1941; and (3) an order dated July 13, 1942 (Exhibit C annexed), denying petition filed by applicant against the order issued March 17, 1942.

The order dated September 2, 1941 (Exhibit A annexed), authorized the issuance of a certificate of public convenience and necessity subsequent to further consideration in the pending proceeding before the Commission (Docket No. MC-78980) as follows:

> "The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:
>
> Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only."

The said order also directed that the previous order issued in this proceeding describing the authority to which applicant has ben found to be entitled be vacated and set aside.

The pertinent facts in the proceedings are as follows:

Herman Trevax, Jacob Vangrofsky, Murray Galley and Morris Glickman, a partnership doing business as Crescent

Mountain Service, filed BMC-A application on February 12, 1936, and on March 26, 1937, filed a BMC-A2 form in which it set forth in detail the type of operation which it conducted and for which it sought authority. (It even went so far as to indicate that because of its operations of sedans, that it was exempt from any and all provisions of the Motor Carrier Act and that the filing of the application should not be deemed a waiver of its rights thereunder.) In the Exhibit A attached thereto, the applicant claimed that it went from New York City via the George Washington Bridge to Suffern and Wurtsboro, where traffic was distributed to the summer resorts within a radius of 20 miles from Woodbourne, N. Y. There was annexed a map indicating the New York area and the manner in which the applicant traveled to the area in and Wurtsboro and *indicated by a large irregular circle as the area served by it.* Attached to the exhibits was a card which read as follows:

"7 Passenger Cars
Leaving Daily to All Parts of the Mountains . . .
At Lowest Rates
(a number of places were listed)
From Your Home to Your Hotel
Boarding And Rooming Accommodations if desired.
Please Call to See Us at Our Residence
About Reservations.
CRESCENT MOUNTAIN SERVICE
531 East 169th Street."

There was no claim made for intermediate points below the mountain area.

On May 7, 1938, a compliance order was issued and on June 20, 1938, corrected compliance order was issued which was in conformance with the then existent practice of the Commission. The corrected order is that in the complaint, Exhibit D. Please note that in accordance with the application this order limited the operating authority in the moun-

tain area to "intermediate and off-route points within 20 miles of Woodbourne", whereas the previous order, which had been vacated or which had been corrected and which had been dated May 7, 1938, had read, "All Intermediate Points" and then, "Off-route points: Points and places within 20 miles of Woodbourne." In other words, the Commission, when it issued its compliance order of May 7, 1938, had at first improperly described the intermediate points and then issued its own corrected order of June 20, 1938, which is the order that the applicant would like to remain in force and effect, to indicate that the intermediate and off-route points were only within 20 miles of Woodbourne.

On June 28, 1938, Exceptions were filed by protestants to the order of June 20, 1938, wherein it was stated, amongst other things: (a) that no regular route operation was operated in the year of 1935; (b) that no business of any kind was done by the applicant or any of its alleged partners at any time at points between New York City and Wurtsboro, N. Y., or the so-called "points in the mountains"; (c) that the applicant or any of its alleged partners did not do any business to all of the points and places within 20 miles of New York; and (d) that the applicant or any of its alleged partners at no time operated between fixed termini.

Prior to the issuance of the compliance orders, order to show cause had been served upon the partnership applicant to dismiss the application for failure to prosecute. An appearance was then made at informal hearings by an attorney representing the applicants; the application was referred to the District Office of the Interstate Commerce Commission for further investigation and informal hearing and conference with the applicants. At the informal hearings before a District Supervisor, additional proof of operation, in the form of affidavits and oral statements, were submitted. It was based upon the sworn statements in the

BMC-A, the BMC-A2, the affidavits, and additional proof that the compliance order of June 20, 1938 (Exhibit D annexed) was issued. These affidavits were made by persons hereafter indicated and contained, among other things, the statements after their names:

1. RUBIN FRIED—January 10, 1938:

"The reason for their service is that they transport people to hotels located in all roads and by-roads, obviating the necessary of their passengers having to use foot or other extraordinary means to get to their actual destination."

2. HARRY K. COHEN, hotel owner—Woodbourne, N. Y. —January 10, 1938:

"I have known Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman, doing business as Crescent Mountain Service, since May, 1932. Their business has been the transportation of guests of mine from New York City to my hotel, and from my hotel to New York City."

3. MOE BAIL—Woodbourne, N. Y.—January 10, 1938:

"We have engaged their cars on numerous occasions for the transportation of guests in our hotel to New York City. * * * I have also been transported by them from my hotel to New York City. During my passage, I noticed that they picked up passengers from various other summer resorts located throughout Sullivan County and transported them to New York City."

4. IZZY F. FELDMAN—hotel owner—Woodridge, N. Y.—January 10, 1938:

"They operate seven passenger sedans and carry passengers to and from summer hotels located in Sullivan and Ulster Counties. * * * The aforesaid Jacob Vangrofsky, Herman Trevax, Murray Galley and Morris Glickman have been engaged in this type of trans-

portation to and from my hotel since 1932. * * * I sincerely believe that their mode of transportation is extremely necessary and convenient for my own and my guests' needs."

5. ISRAEL LEVINE—store proprietor—used by applicant at 531 East 169th Street, New York City—January 14, 1938:

"I have personally seen them arranging for said trips with passengers."

6. ADELE DINCENTHAL -Bronx, N. Y.—January 14, 1938:

"In the summer of 1933 and 1934, I hired the aforesaid persons (referring to the applicants) to transport me and my family from their office to Accord in the County of Ulster. * * * My family and I have personally found that this method of transportation is most convenient, and the most economical for our purpose."

7. EDNA LIVINGSTON—Bronx, N. Y.—a person who had hired a car of applicants for herself and her family—January 14, 1938:

"Riding with us at the times that we were transported to North Branch, New York, by the aforementioned Crescent Mountain Service, were other passengers who were transported to other points in Sullivan and Ulster Counties. I specifically remember other passengers being taken to Kenoza Lake, Jeffersonville, White Lake, Mongaup Valley and Swan Lake."

(Note: A reference to a map will disclose that the operator serving all of these points in the one car was obviously operating over irregular routes and not between fixed termini.)

8. HARRY TREVAX—the father of one of the applicants—January 14, 1938:

"My wife and I helped him out by answering phone calls and booking work."

In addition to the affidavits as aforementioned, there were submitted the books indicating the manner in which the partnership conducted this business which were diaries showing reservations for passengers. At no time was there ever produced any schedules of operations or any proof of operation of a regular route terminal to terminal operation, nor any advertisements, holding outs, leases, or other evidence indicative of such an operation.

Upon all of this proof, the Commission issued the compliance order of June 20, 1938, limiting the applicant's service to points in New York City, on the one hand, and intermediate and off-route points within 20 miles of Woodbourne, on the other, and described a regular route as the method of operating between New York City and the area. Exceptions of protestant being duly filed to the order of June 20, 1938, the Commission then had before it the complete record upon which it would have to make a determination as to the authority which the applicant was entitled to. *There never was a dispute as to the facts.*

After the filing of the Exceptions by protestants to the order of June 20, 1938, the proceedings were again referred back to the Commission District Office for further informal investigation and on October 31, 1938, District Supervisor D. V. Grant of New York addressed a letter to the applicant's predecessors advising them:

> "Upon specific complaint, the finding made by this Commission in the matter of your 'grandfather' rights has been stayed and the application returned to me for further informal investigation and report."

They were requested to be present on December 1, 1938, at which time protestants were also present.

At the informal conference on December 1, 1938, no additional data was submitted over and above that originally given to the Examiner and that data consisted of evidence

of sedan movements over irregular routes in a door-to-door service, between points in New York City, on the one hand, and specific points in Sullivan and Ulster Counties, on the other.

While these proceedings were pending, the Commission had before it 58 applications involving the identical territory, type of operation, and the question as to the type of service to be described in any certificate to be issued to the operators of such service. These cases were consolidated by the Commission and were known by it as *Irving Nudelman, Common Carrier, MC-86772, et als.* In addition to these 58 cases, there was the application of *Sullivan County Highway Line, Inc., MC-29649*, covering identical and similar facts of operation,

On February 15, 1940, the Commission, Division 5, submitted its report on the *Sullivan County Highway case* and on March 20, 1940, submitted its report in the *Nudelman et als. cases.* On February 25, 1941, the Commission, Division 5, on reconsideration, submitted its further report in the *Nudelman cases* and on August 2, 1941, submitted its further report on the *Sullivan County Highway case*, wherein they found that applicants were engaged in special seasonal operations as common carriers by motor vehicle of passengers and their baggage, between New York, N. Y., or portions thereof, on the one hand, and Sullivan and Ulster Counties, N. Y., or portions thereof, on the other, over irregular routes through New Jersey, by restricting the authority to special operations in non-scheduled door-to-door service, limited to the transportation of not more than 6 passengers in any one vehicle, but not including the driver thereof, and not including children under 10 years of age who do not occupy a seat or seats.

On September 2, 1941, the order, (Exhibit A annexed) attacked herein, was issued which merely substituted a description of applicant's type of service rendered on June 1,

1935, in conformity with the Commission's determination in the *Nudelman* case in the place and stead of its previous description of the type of authority as contained in the order of June 20, 1938 (Exhibit D annexed) which applicant seeks to have remain in force and effect.

On October 9, 1941, applicant, a corporation succeeding to the interests of the partnership, filed a protest and petition to stay issuance of the certificate authorized in the order of September 2, 1941, wherein they urged that said order was issued without notice; that it changed the content of the previous compliance order so as to direct a non-scheduled door-to-door service over irregular routes with vehicles having no more than 6 passengers; and that the real issue was whether the Commission had the right to restrict a carrier to vehicles of the sedan type. This petition was filed 37 days after September 2, 1941, although the order of September 2, 1941, directed that Exceptions thereto by the applicant should be filed within 30 days therefrom.

Said petition requested that the order be vacated and set aside and the compliance order of June 20, 1938, reinstated. No issue was made therein as to the facts, nor was any request for further hearing or facts essential to such request contained in this petition. Said petition was denied on March 17, 1942 (Exhibit B annexed).

On April 3, 1942, applicant filed petition for reconsideration by the entire Commission and/or to reopen and grant a hearing. It was repeated therein that no hearings to support the new order were had and that there was no evidence taken to support the change in the order previously issued on June 20, 1938. The said petition went on further to state: "The only evidence in the record is that taken at the ex parte hearing which was sufficient to support the compliance order of June 20, 1938, or the same would not have been made." That the restrictions in the order of Septem-

ber 2, 1941, were contrary to statute and that the alleged limitation and restrictions were in violation of Section 208 (a) of the Motor Carrier Act, to the effect that any certificate issued should not restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate as the development of the business and the demands of the public should require. This petition was denied by the entire Commission by its order of July 13, 1942 (Exhibit C annexed).

Appellants' Claim to Jurisdiction and Determination by the Supreme Court of the United States Is Not Substantial.

It is respectfully urged that all of the alleged issues set forth by the plaintiff herein are not substantial and, therefore, the decree and judgment of the lower court should be affirmed.

Plaintiff alleges that the Commission has exceeded its statutory authority in making the order of September 2, 1941, (a) by limiting or restricting the rights granted so that plaintiff should not transport more than 6 passengers in any one vehicle; (b) by limiting to door-to-door service; (c) by limiting operation over irregular routes; (d) by limitation to non-scheduled operations; and (e) by limiting the rights granted to special operations.

That the alleged limitations were made for the purpose of restricting and limiting the plaintiff to the use of 7 passenger sedans as distinguished from larger vehicles.

That there is no factual or legal basis for limiting the rights granted to transport only 6 passengers because it fails to take into consideration that a large number of children under 10 years of age might require transportation with their parents.

That the order of September 2, 1941, is unlawful and illegal and without proper foundation, but that the conclusions of the order of June 20, 1938, were correct, and that the action of the Commission in making the order dated September 2, 1941, was incorrect and illegal because it was not based on new, additional, or different evidence, as no further hearings were had, and therefore, no facts were before the Commission sufficient to sustain said order.

That the order is incorrect because by the limitation to door-to-door service, many passengers go to stations maintained by plaintiff which are within the towns and villages served by it.

That the restriction to irregular routes is contrary to the statute and geographical conditions in the area and that the description of "special operations" is arbitrary and illegal and that said words are meaningless, vague and uncertain and ambiguous. (See amended complaint.)

Statutes Involved.

The following sections of the Interstate Commerce Act are pertinent herein:

> Sec. 206 (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, However, That*, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service

only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful * * *.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission,

Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Sec. 208. (a) Any Certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certifi-

cate, as the development of the business and the demands of the public shall require.

Sec. 204(a) (6) To administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; * * *

Sec. 205(h) All the provisions of section 17 of part I shall apply to all proceedings under this part.

Sec. 17 (3) The Commission shall conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

ARGUMENT.

It is quite clear that plaintiff does not take issue with the Commission on the facts as submitted by it or its predecessors and that in form BMC-A2 and at two informal hearings, full opportunities were afforded the predecessors to present their evidence which would entitle them to a certificate. It is noteworthy that after October 31, 1940, at which day plaintiff, Crescent Express Lines, Inc., was substituted for the partnership, that legal objections were made to the procedure of the Commission. The partnership predecessors had had two informal hearings; one prior to the issuance of the order of June 20, 1938; and the other after filing of exceptions to said order by protestants, and after the stay of said order of June 20, 1938.

At the time the corporation plaintiff herein succeeded to the interests of the partnership, it was in no better position and was not entitled to any more right or authority than the partnership. At the time that it succeeded, it did so with full knowledge of the fact that there was pending before the Commission exceptions to the order of June 20, 1938, and that there was pending before the Commission the question of the proper description of type of service

rendered by applicant and other similar types of carriers in the territory. Protestants had never denied that plaintiff's predecessors were entitled to a certificate of convenience and necessity pursuant to Section 206 (a) of the Motor Carrier Act, but always insisted that in accordance with the provisions of Section 208(a), the certificate issued should specify the service to be rendered, and, in case of operations not over specified routes or between fixed termini, the territory within which the motor carrier is authorized to operate and that, in accordance with Section 207, a certificate should be issued herein for special operations as distinguished from regular route and between fixed termini.

Plaintiff makes issue of the fact that the order of September 2, 1941, could not be issued by the Commission because there had not been any further hearing, nor had there been obtained or adduced additional or new information or evidence to support this new order. Section 206(a), commonly known as the "grandfather" clause, authorizes the Commission to issue a certificate to passengers carriers who were in bona fide operation on June 1, 1935, or, if engaged in seasonal service, during the season ordinarily covered by its operation, without being required to prove convenience and necessity as provided in Section 207(a) of the Act. Section 207 permits a certificate to be issued to any qualified applicant if it is found that the applicant is fit, willing and able to properly perform the service proposed and to conform to the provisions of Section 207 and the requirements, rules and regulations of the Commission thereunder. (In the case of those persons proceeding under Section 206, it was not necessary to find convenience and necessity.)

The method in which the Commission could issue the certificate was left entirely to it. Accordingly, the order of June 20, 1938, was issued which plaintiff herein would

be satisfied with and therefore no question is raised before this Court as to the propriety of the procedure of the Commission in the issuance of said order of June 20, 1938, upon the record and proceedings before the Commission. This record and proceedings have been fully enumerated heretofore. Upon the filing of exceptions by protestants to said order, legal questions were raised as to the description of service and type of service to be inserted in a certificate to be issued to the applicant's predecessors. The order of June 20, 1938, authorized a regular route scheduled terminal to terminal service.

The facts in respect to the method of operation by the applicant's predecessors on June 1, 1935, and thereafter indicated that they were, in fact, engaged in a service which is properly described as a door-to-door, non-scheduled, irregular route service, using vehicles transporting no more than 6 passengers exclusive of the driver and children under 10 years of age who do not occupy a seat. This type of service was identical to that as contained in the *Nudelman and Sullivan County Highway* cases and obviously the delay in issuing a new order after the Exceptions to the order of June 20, 1938, was occasioned by the pending proceeding as to the question of law involved.

In the *Nudelman* cases, the Commission in its first report described the service rendered as "seasonal service for the transportation of passengers and their baggage in 7 passenger sedans between New York City, or portions thereof, on the one hand, and summer resorts in the Catskill Mountains, hereinafter referred to as the Mountains, in Sullivan and Ulster Counties, on the other." It states further that the type of service rendered was as follows:—

> "That generally the applicants operate door-to-door, not over fixed routes, nor between fixed termini, and not on fixed schedules; that they do not pick up or discharge passengers in the State of New Jersey; that the

fair paid by each passenger each trip is subject to oral agreement between such passenger and the carrier, and no written contracts are entered into; and that passengers are transported by motor vehicle across State lines upon and over public highways for compensation." (22 M.C.C. 277).

In its report on reconsideration, 28 M.C.C. 91, 93-95, it states:—

"Upon further consideration we are of the opinion that our prior construction of Section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered,' subject to the proviso that we cannot restrict the right of a carrier to 'add to his or its equipment and facilities * * * as the development of the business and the demands of the public shall require.' In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitations to the quantity of the service to be furnished. This construction is in line with our decision in *Pittsburgh-Weirton Bus Co., Inc., Com. Car. Application* 10 M.C.C. 266, wherein we discussed the meaning of the proviso in question. In that case, the issue was presented as to whether that applicant had inaugurated a new operation by increasing its service between 2 points from 1 round trip daily to 250 one-way trips daily. In deciding that question in the negative, we construed the proviso of section 208(a) to mean (page 270):

This prohibition protects the right of the carrier to expand not only its 'equipment' but also its 'facilities.' The only purpose of such expansion is to enable the carrier *to provide more service*, and this is very clearly indicated by the words 'as the development of the business and the demands of the public shall require.' It follows that 'terms, conditions, or limitations' in the certificate restricting *the service* of the carrier would

be wholly inconsistent with this proviso. (Emphasis supplied.[1])

We did not conclude in that case, however, that we were without power to restrict a carrier to the use of certain types of vehicles for the purpose of describing the servicce to be rendered. What we found was that we have no power to restrict a carrier by the terms of its certificate from expanding the quantity of its service to meet the demands of the public.

With this exception, our power to specify in any certificate we issue the service to be rendered is complete. For instance, in *Schwerling Common Carrier Application*, 23 M.C.C. 459, we required the applicant carrier to maintain a schedule of not less than one round trip per hour during certain periods. In other instances we have found it necessary, in order to specify definitely the character of the service to be rendered, to restrict a carrier to the use of certain types of equipment. For example: In *Miller Extension of Operations*, 21 M.M.C. 401 (prior report, 12 M.C.C. 457), the authority granted therein was restricted to liquid petroleum products in tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, authority was restricted to driveaway service; in *Central Truckaway System, Inc., Com. Car. Application*, 19 M.C.C. 713, authority was restricted to truck-away service; in *Parcel Delivery Service, Inc., Contract Carrier Application*,[2] 8 M.C.C. 275, authority was granted to transport packages and parcels of merchandise by motor vehicle 'the equipment being limited to motorcycle traffic cars, with panel bodies'; in *Billy Baker Co., Common Carrier Application*, 24 M.C.C. 805, authority was granted to transport, among other things, cement in dump trucks; and in *Barrows Common Carrier Application*, 19 M.C.C.

[1] In this report, wherever quoted words or phrases are italicized, it is to be understood that such emphasis is supplied.

[2] Although this application was later dismissed for reasons not pertinent herein, the same applicant on April 10, 1939, was issued a certificate containing the same restrictions pursuant to *Parcel Delivery Service, Inc., Common Carrier Application*, 13 M. C. C. 15.

179,[3] authority was restricted to the transportation of not more than six passengers per trip. Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles in describing the particular service to be rendered under the authority granted.

Because we have the power to restrict a carrier to the use of certain types of vehicles, in specifying the service to be rendered, it does not necessarily follow that we should in all cases impose such a restriction, for the circumstances do not always warrant it. Each case, of course, must be decided on its own merits."

By virtue of the determination in the *Nudelman case* the Commission, by its order of September 2, 1941, merely authorized the issuance of an appropriate order properly describing the service rendered by plaintiff's predecessors upon all of the evidence and facts before it. Plaintiff does not dispute or deny the facts and method of operation. It attempts to confuse the issue by stating that the order of September 2, 1941, limits the holder of the certificate to the use of sedans in contravention of that portion of Section 208(a) which permits a carrier to increase or decrease its service as the demands of the business may require. The Commission in the *Nudelman* report, heretofore recited, has fully discussed its position in respect thereto. Simply stated, it merely means that once a certificate is issued, whether it be pursuant to Section 206 or 207 describing the type of service to be rendered, then there shall be no limitation as to the quantity of that type of service.

The plaintiff claims that by virtue of the failure of the Commission to conduct further hearings or to have before it additional evidence, its rights would be prejudiced, and that it was being deprived of its property without due

[3] No exceptions to the order recommended by the joint board in this case were filed, and, not having been stayed or postponed by us, it became effective as our order by operation of law.

process of law. Since the plaintiff and its predecessors were proceeding pursuant to Section 206, and, in order to issue a certificate pursuant thereto it is incumbent upon the Commission to ascertain in such proceedings and manner as are just and equitable, the extent of the service rendered, and, plaintiff's predecessors having had two opportunities at informal conferences of submitting data to support its application, at one of which conferences protestants and other carriers in the area were not notified, nor were they present, it cannot be stated that plaintiff is being deprived of its rights or property. The only ones who would be in a position in this case to make claim of prejudice or of not having had an opportunity to present evidence, it would be the protestants, by virtue of the fact that they were never apprized of the first informal hearing. The protestants, however, have always conceded that applicant's statements at the informal hearings were true statements as to the facts of operation but have merely differed on the question of law as to the type of service to be described in a certificate to be issued.

Plaintiff, as successor to the partnership by the order of September 2, 1941, is being awarded a certificate fully and properly descriptive of the type of service rendered on June 1, 1935. Its arguments that elements of safety and certain inconveniences to children under 10 years of age were not taken into consideration were not matters for consideration under Section 206. The question of safety of operations is an administrative problem which the Commission is fully authorized to handle. The question of inability of certain children under 10 years of age to ride without paying fare is an element of convenience and necessity not involved in a proceedings under Section 206.

The Commission, Upon Investigation and Proceedings Having Obtained the Facts of Operations, Is in the Same Position as Having Made Its Own Findings and Is Accordingly Authorized to Issue a Certificate Pursuant to Section 206.

The Commission must, in the issuance of such a certificate, properly distinguish and describe the service to be rendered. Its description of a door-to-door irregular route non-scheduled service limited to the transportation of not more than a certain number of passengers is a proper method of description of types of operations. The question as to differences in types of operations has been passed upon by the United States Supreme Court.

United States v. *Maher*, 307 U. S. 148, 152-153:[4]

> "On the merits the case brings into question the validity of the construction placed by the Interstate Commerce Commission upon Section 206 (a) of the Motor Carrier Act relieving carriers operating on June 1, 1935, under the circumstances defined by the terms of Section 206 (a) from the requirements of Section 207. The latter section requires a finding by the Commission that the granting of such a certificate is demanded by public convenience and necessity. But under Section 206(a) the Commission must issue 'such certificate without requiring further proof that public convenience and necessity will be served' by an applicant who 'was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time.' By this legislation Congress responded to the felt need for regulating interstate motor transportation through

[4] This question was presented to the United States District Court in Oregon while exemptions to the order of June 20, 1938, in these proceedings were pending and a final determination was made by the United States Supreme Court on April 17, 1939.

familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established."

Page 155:

"The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiation between operations over the 'route or routes' for which an application under the 'grandfather' clause is made as against operation 'within the territory', Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular route bus operations between fixed termini. Such recognition is implicit also in the provisions of Section 208(a) 49 U. S. C. A. #308(a), that 'Any certificate issued under section (306 or 307) 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate.'"

Alton R. Co. v. *United States*, 315 U. S. 15, 23:

"Appellant railroad companies also urge that Fleming should not have been awarded any rights under the 'grandfather' clause in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal. Thus there was evidence that on and since June 1, 1935, Fleming had been in bona fide operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have

said, that function is peculiarly one for the Commission not the courts."

Rochester Telephone Corporation v. *U. S.*, 307 U. S. 125, 138-140:

"While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act in 1906, and the Mann Elkins Act in 1910, the establishment of similar agencies in many states following the lead of New York and Wisconsin, the widespread recognition that these specific instances marked a general movement, made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. This Court 'ascribed' to the findings of the Commission 'the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R.R. *vs.* Interstate Commerce Commission, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Recognition of the Commission expertise also led this court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.

"From these general considerations the Court evolved two special doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority, and basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission *v.* Illi-

nois Central R. R., 215 U. S. 452, 470, 30 S. Ct. 155, 160, 54 L. Ed. 280; Interstate Commerce Commission *v.* Union Pacific R. R., 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308."

Page 146:

"The judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body." Mississippi Valley Bargeline Co. *v.* United States, 292 U. S. 282, 286, 287, 54 S. Ct. 692, 693, 694, 78 L. Ed. 1260; Swayne & Hoyt, Lt. *v.* United States, 300 U. S. 297, 303 et seq., 57 S. Ct. 478, 480, 81 L. Ed. 659."

United States et al. *v.* Carolina Freight Carriers Corp., 315 U. S. 475, 480.

"We think the Commission was justified in the restrictions which it placed on the geographical scope of appellee's operations. Sec. 206 (a) of the Act authorizes the Commission to issue a certificate without a showing of public convenience and necessity if the carrier or its predecessor was 'in bona fide operations as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application and has so operated since that time.' Sec. 208 (a) requires that the certificate specify 'the routes over which, the fixed termini, if any, between which, and the intermediate and off route points, if any, at which and in case of operations not over specified routes or between fixed termini the territory within which, the motor carrier is authorized to operate.' It is clear from these provisions that the power of the Commission to authorize future operations within a designated 'territory' rather than over specified routes or between fixed termini, fits the peculiar requirements of irregular route operators such as appellee. Authority to operate within a specified 'territory' may include permission to service all points in that area. On the other hand it may be restricted to designated points therein. Or as in the instant cases, it

may extend to all points in a part of that area, and to selected localities in another part. The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. Alton R. Co. *v.* United States, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. —. The act, provides the test of 'bona fide operation.' That standard carries the connotation of substantiality. It also makes clear that a holding out to service a specified area is not alone sufficient. It is 'actual rather than potential or simulated service' which is required. McDonald *v.* Thompson, 305 U. S. 263, 266, 59 S. Ct. 176, 178, 83 L. Ed. 164."

Page 483 says:

"Sec. 206 (a) requires a showing that the applicant or its predecessor, was 'in bona fide operation as a common carrier' on June 1, 1935, and 'since that time'. By #208 (a) the certificate must specify 'the service to be rendered' by the carrier."

WHEREFORE, it is respectfully prayed that the decree and judgment of the statutory court be affirmed.

Dated: New York, N. Y., May 4th, 1943.

Respectfully submitted,

HENRY P. GOLDSTEIN,
Attorney for Intervenor,
Mountain Transit Corporation,
Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

EXHIBIT "A".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

No. MC-78980.

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK.

This proceeding coming on for further consideration:

It appearing, That a previous order having been entered in this proceeding authorizing the issuance of a certificate of public convenience and necessity upon compliance with the terms of said order; that protests or exceptions to said order having been duly filed; and further consideration having been had:

It further appearing, That applicant or predecessor in interest was, on June 1, 1935, and continuously since has been, in bona fide operation as a common carrier by motor vehicle in interstate or foreign commerce according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216, and 217 of the Interstate Commerce Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, and upon filing appropriate publications providing for the cancelation of any effective rates or charges applying to transportation service in excess of that herein or otherwise lawfully authorized, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorizing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto* and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby, denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is further ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this order*, a petition setting forth the grounds relied upon in opposing the granting of such authority and rquesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with the requirements therein specified, be, and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 2nd day of September, A. D. 1941.

No. MC-78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passen-

gers and their baggage, in special operations, in non-scheduled door-to-door service, limited to the transportation of not more than six passengers in any one vehicle, but not including the driver thereof, and not including children under ten years of age who do not occupy a seat or seats, during the season extending from June 1 to October 1, inclusive, over irregular routes, is as specified below:

Between New York, N. Y., on the one hand, and, on the other, points and places in Sullivan County, N. Y., and the Townships of Hardenbergh, Denning, Rochester, Warwarsing, Gardiner, and Shawangunk, Ulster County, N. Y., traversing New Jersey for operating convenience only.

EXHIBIT "B".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 17th day of March, A. D. 1942.

No. MC-78980

APPLICATION OF CRESCENT EXPRESS LINES, INC., NEW YORK, NEW YORK

This proceeding coming on for further consideration:

It appearing, That a petition has been filed by applicant objecting to the order of September 2, 1941, issued herein; and further consideration having been had, and good cause appearing therefor;

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission, division 5.

[SEAL.]

W. P. BARTEL, Secretary.

EXHIBIT "C".

Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of July, A. D., 1942.

No. MC-78980

CRESCENT EXPRESS LINES, INC.,
NEW YORK, NEW YORK

Upon consideration of the record in the above-entitled proceeding and petition filed by applicant against the order issued March 17, 1942; and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission,
[SEAL.] W. P. BARTEL, Secretary.

EXHIBIT "D".

Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 20th day of June, A. D. 1938.

No. MC-78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

After due investigation:

It appearing, That applicant in accordance with the requirements of Section 206, Motor Carrier Act, 1935, including due service, made application for a certificate of public convenience and necessity to operate as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order, and that the said ap-

plicant or predecessor in interest was in bona fide operation in such manner on June 1, 1935, and has so operated since that time; and the Commission so finding; therefore,

It is ordered, That upon full compliance with the requirements of Sections 215, 216 and 217 of the said Act, and the rules and regulations prescribed by the Commission thereunder, *governing the filing of common carrier rate publications and filing and approval of evidence of security for the protection of the public*, a certificate of public convenience and necessity shall be issued, unless otherwise ordered, authorinzing said applicant to engage in interstate or foreign commerce, as a common carrier by motor vehicle according to the specification *set forth as appended on the reverse side hereof or attached hereto*, and made a part of this order.

It is further ordered, That in all other respects the said application shall be, and it is hereby denied, *and that on and after 30 days from date of this order*, unless on the Commission's own motion or for good cause shown it is otherwise ordered, applicant shall not engage in any motor carrier operations not described herein or otherwise lawfully authorized.

It is further ordered, That in the event said applicant has not complied with the requirements herein *within 30 days from date of this order*, then said applicant shall show cause, if any there be, *within 60 days from the date of this order*, why said application should not be dismissed, failing in which the said application shall be dismissed without further proceedings.

It is futher ordered, That if applicant or any other party in interest desires to protest the issuance of such certificate, such applicant or party in interest shall file with the Commission *within 30 days from the date of this* order, a petition setting forth the grounds relied upon in opposing the granting of such authority and requesting that the issuance of the said certificate be withheld pending further investigation and order by the Commission.

And it is further ordered, That the previous order issued in this proceeding, describing the authority to which applicant has been found to be entitled, upon compliance with

the requirements therein specified, be and it is hereby, vacated and set aside.

By the Commission, division 5.

[SEAL.] W. P. BARTEL, Secretary.

Appendix to the order of the INTERSTATE COMMERCE COMMISSION, Division 5, dated the 20th day of June, A. D. 1938.

No. MC-78980

APPLICATION OF HERMAN TREVAX, JACOB VANGROFSKY, MURRAY GALLEY, AND MORRIS GLICKMAN, A PARTNERSHIP, DOING BUSINESS AS CRESCENT MOUNTAIN SERVICE, BRONX, NEW YORK.

The service to be rendered by applicant, as authorized by the order of which this is a part, in interstate or foreign commerce as a common carrier by motor vehicle of passengers and their baggage, over the regular route, between fixed termini, and to and from intermediate and off-route points, during the season extending from the 1st of June to the 1st of October, inclusive, is as specified below:

Between New York, N. Y., and Woodbourne, N. Y.:

From New York over George Washington Bridge to Fort Lee, N. J., thence over New Jersey Highway 4 to Bergenfield, N. J., thence over New Jersey Highway 2 to the New Jersey-New York State line, thence over New York Highway 17 to Monticello, N. Y., and thence over New York Highway 42 to Woodbourne, and return over the same route.

Intermediate and off-route points within 20 miles of Woodbourne.